

March 10, 2016

**FOR YOUR INFORMATION**

To: Mayor and Members of Council

From: Harry Black, City Manager **HB**

Subject: **Streetcar Funding and the Haile Foundation Streetcar Guaranty**

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The City Administration and the Ralph V. Haile, Jr./U.S. Bank Foundation ("Haile") have entered into a settlement agreement to address a potential dispute over the implementation of Haile's Limited Guaranty for streetcar operating costs dated December 19, 2013 (the "Guaranty"). The City's goal in negotiating with Haile has been to increase certainty regarding the timing and amount of Haile's Guaranty payments, thereby securing the assurances it requires to include the Haile Guaranty payment into the streetcar operating budget. The agreement applies to the first two years of streetcar operations (estimated to be Sept. 2016 to October 2018).

The start of streetcar operations is subject to budget uncertainty attributable to the wide range of reasonable projections for streetcar revenue. The Administration has worked diligently to develop a conservative set of budget projections that, together with added confidence in an undisputed payment by Haile, will allow it to submit to Council a \$4.2 million budget for streetcar operations and maintenance costs for the first year of revenue service. The \$4.2 million budget is drawn from a variety of funding sources, including the Haile payment, streetcar revenues (fares, advertising, naming rights, etc.), payments for streetcar operations from the City's tax incentive policy (VTICA), federal formula funds, and \$1.5 million from the general fund.

Under the accepted funding formula, the City and Haile project a Guaranty payment of \$900,000 per year. For its part of the bargain, the Administration will recommend to City Council a streetcar budget of \$4.2 million that will include \$1.5 million in general fund parking revenue and a commitment to additional City funding capped at \$680,527 in Year 1 and \$518,888 in Year 2. The settlement agreement only takes effect if City Council elects to fund streetcar operations at or above the levels set in the agreement.

If actual streetcar revenue is less than budget projections, the City has reserved its right to institute cost-saving measures such as service cuts in order to balance the budget – without impacting Haile's payment obligation. If streetcar revenues exceed budget projections, the "surplus" will be applied on a dollar-for-dollar basis to reduce the amount of additional City funding required to balance the streetcar budget.

Attachment



## AGREEMENT

This constitutes an agreement ("Funding Agreement") between the Carol Ann and Ralph V. Haile, Jr./U.S. Bank Foundation ("Haile") and the City of Cincinnati ("the City") to settle a dispute regarding the implementation of the parties' Limited Guaranty Agreement for streetcar operating costs dated December 19, 2013 ("the Guaranty").

By signing this Funding Agreement, the City and Haile, acting for itself and on behalf of any unnamed third-party contributors to the Guaranty, commit to the settlement terms described herein for implementing the Guaranty during the first two years of streetcar Revenue Service, anticipated to run from approximately September 15, 2016 to September 14, 2018.<sup>1</sup> For purposes of this Funding Agreement, "Revenue Service Year" means the 12-month period commencing on the first day of Revenue Service ("Start Date") for Year 1, and the 12-month period commencing on the one-year anniversary of the Start Date for Year 2.

This Funding Agreement is intended to put in place the provisions and procedures necessary to implement and effectuate the Guaranty, so that the parties will have certainty concerning the timing and amount of payments due under the Guaranty, despite differing interpretations between them regarding the operation and intended application of the Guaranty. To this end, the parties hereby agree to the provisions and procedures set forth below.

1. For purposes of this Agreement, the sum of all of the following categories of streetcar-related costs incurred during a Revenue Service Year covered by this Agreement (Years 1 and 2) shall be treated as the total cost of streetcar operations and maintenance for that year ("the O&M Costs"):

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<sup>1</sup> "Revenue Service" shall have the meaning set forth in the Operations and Maintenance Intergovernmental Agreement ("OMIGA") entered into by the City and SORTA in March 2015, which definition is incorporated into SORTA's July 2015 contract with Transdev Services, Inc. for streetcar operating services.



a. The total amount of the Transdev Services, Inc. ("Transdev") contract operating costs for each Revenue Service Year covered by this Agreement, which contract contains pre-negotiated escalators for each Revenue Service Year;

b. SORTA's direct costs for streetcar operations, which shall include (to the extent not borne by Transdev and otherwise included among those covered by the Transdev contract) the cost of electricity (i.e., traction power) needed to run the streetcar vehicles, costs of maintaining SORTA-provided streetcar systems (e.g., radio communications, ticket vending machines, etc.), and costs that SORTA incurs for streetcar-related information technology (including network support and data access lines, both hard wire and wireless), ridership development and marketing (including public information such as ride guides, system maps, etc.), fare media (magnetic and smart card ticket stock including TVM receipt paper), credit card fees, TVM equipment maintenance, radio system maintenance, CAD/AVL/APC and PIDS equipment maintenance, audits, license fees, occupying and operating the streetcar Maintenance and Operations Facility, and outside legal support related solely to the streetcar;

c. SORTA's Streetcar Overhead, which shall be 8% of 1(a), above, for each Revenue Service Year covered by this Agreement;

d. The City's Streetcar Overhead, which shall consist of:

i. Cincinnati Department of Public Services costs that would not be incurred but for streetcar operations, including the cost of three additional full-time employees (a Service Area Coordinator and two Electrical Maintenance Worker 2 positions) and the one-time cost of acquiring specialized maintenance equipment required to properly maintain roadway signals and streetcar right-of-way when the streetcar becomes operational (i.e., a Street Sweeper, a Broom Sweepster, an Aerial Truck, and a Plow) amortized over their expected useful life;

ii. Cincinnati Fire Department costs that would not be incurred but for streetcar operations, including the cost of specialized equipment for testing whether the streetcar OCS (overhead wires) are live when providing services along the streetcar route, which cost also would be amortized over the expected useful life of the equipment;



iii. The cost of a Transit Coordinator<sup>2</sup> or equivalent full-time position to manage and oversee the City's contract with SORTA for streetcar operations and to implement the City's responsibilities under the OMIGA (as set forth in the Responsibilities Matrix attached as Exhibit B to the OMIGA), manage existing City streetcar federal grant obligations (e.g., as co-grantee), administer risk management policies for the streetcar, manage the City's streetcar capital assets (e.g., track, vehicles, overhead system, maintenance and operating facility), seek and apply for new streetcar grant funding, and oversee and administer the streetcar long-term capital improvement program; and

iv. Cincinnati Law Department costs that would not be incurred but for streetcar operations, which costs shall include attorney hours billed at ordinary rates to departments for legal services regarding (1) City operations and maintenance obligations under the OMIGA and (2) the defense or prosecution of third-party legal actions in connection with streetcar operations, except that O&M Costs shall not include legal actions by the City or SORTA against one another.

2. The following Funding Sources ("the Funding Sources") shall be used as the initial sources to pay the O&M Costs for each Revenue Service Year covered by this Agreement:

a. All streetcar revenue generated by:

i. fares collected during the Revenue Service Year, including payments derived from third-party revenue contracts, charter service or supplemental service (pro-rated per Revenue Service Year, if applicable),

ii. advertising and sponsorships, including system and station sponsorships (with multi-year advertising or sponsorships pro-rated per Revenue Service Year),<sup>3</sup> and

iii. naming rights, including system and station naming rights (with multi-year naming rights pro-rated per Revenue Service Year);

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<sup>2</sup> The portion of a Transit Coordinator's responsibilities, if any, that correspond to oversight of Metro bus service or other transit services shall not constitute O&M Costs for purposes of this Funding Agreement.

<sup>3</sup> For advertising and sponsorship revenue generated prior to the start of Revenue Service, such revenue shall be deemed revenue for purposes of Revenue Service Year 1 (with multi-year advertising or sponsorships pro-rated for the pre-Revenue Service period).



b. All Federal Transit Agency formula funds received during the Revenue Service Year by reason of or in connection with the streetcar;

c. All third-party payments remitted directly or indirectly to SORTA to pay for streetcar operations, pursuant to incentives instituted by City Council through its Tax Incentive Policy;<sup>4</sup>

d. The \$1,500,000 contribution per Revenue Service Year from the City's general fund.<sup>5</sup>

3. If the Funding Sources do not cover all of the O&M Costs in a Revenue Service Year covered by this Agreement, Haile shall be obligated to make a payment equal to the difference between the O&M Costs and the Funding Sources for that Revenue Service Year, up to a maximum amount of \$900,000 ("the Guaranty Payment").<sup>6</sup>

4. After completion of each Revenue Service Year, but no later than six months after the end of the Revenue Service Year, the City shall transmit to Haile its request for the Guaranty Payment ("Guaranty Payment Request").

5. Each Guaranty Payment Request shall itemize the amounts of all of the O&M Costs identified in Section 1, above, and of all of the Funding Sources identified in Section 2, above, for the previous Revenue Service Year. Haile shall remit the Guaranty Payment no more than 30 days after receiving the Guaranty Payment Request irrespective of a dispute under Section 6.

6. No later than three business days after receiving the Guaranty Payment Request, Haile may request specific additional accounting of the amount of any of the O&M

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<sup>4</sup> For purposes of this Funding Agreement, "Tax Incentive Policy" shall mean the City's policy of giving private property owners incentives to commit a portion of their real property tax exemption savings to supporting streetcar operations.

<sup>5</sup> Although the City previously described this \$1,500,000 as coming from revenues derived from Over-the-Rhine/Central Business District parking meters, the City now prefers to describe it as coming from the "general fund." Haile accedes to this new description preferred by the City, with the understanding, shared by both sides, that the City's commitment to provide this \$1,500,000 remains the same and that Haile does not thereby waive any arguments it might have had based on the original "parking" revenue description.

<sup>6</sup> The parties disagree as to the intended application of the "two-thirds provision" in the Guaranty. For purposes of this Funding Agreement only, Haile agrees that the two-thirds provision shall not apply. By agreeing to waive this limitation only for the years covered by this Funding Agreement, Haile does not waive it for any other year covered by the Guaranty.



Costs and Funding Sources itemized in the City's request for the Guaranty Payment. The City shall respond to specific requests for additional accounting within 10 business days after Haile's request. The parties will work in good faith to resolve any disputes over the accounting of Funding Sources or O&M Costs. In consideration of Haile's agreement to make the Guaranty Payment on the timetable described above, and in order to minimize the potential for disputes, the City agrees that the City's Streetcar Overhead, as defined in Section 1(d), shall be capped at \$365,000 per year for purposes of Section 3. Haile may dispute the amount of any of the O&M Costs or Funding Sources itemized in the Guaranty Payment Request by filing an action in a court of law, in which case each side agrees to bear its own legal fees and litigation expenses.

7. The parties agree that any streetcar funding that the City provides over and above the Funding Sources identified in Section 2, above ("Additional City Funding"), and any costs the City incurs over and above the O&M Costs identified in Section 1, above, shall not be factored into the calculation of the Guaranty Payment owed pursuant to this Funding Agreement. The parties intend that, in tabulating O&M Costs pursuant to Section 1, above, there shall be no double-counting of streetcar-related charges, whether incurred by SORTA, the City, or Transdev.

8. Subject to the three qualifiers set forth in subsections 8(a)(i), (ii), and (iii), below, the City intends to provide Additional City Funding that, together with the Guaranty Payment and the Funding Sources, will be adequate to fund the estimated O&M Costs for Revenue Service Years 1 and 2 as set forth in Exhibit A.<sup>7</sup>

(a) The Additional City Funding shall be deemed adequate for purposes of this Funding Agreement if it equals or exceeds the amounts found on the last line of Exhibit A for the relevant Revenue Service Year, subject to the following three qualifiers:

(i) The City may, at its discretion, provide Additional City Funding at amounts higher than those found on the last line of Exhibit A;

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<sup>7</sup> The City's commitment under this Section 8 is subject to City Council's discretion to appropriate streetcar funding at the level it deems appropriate, which may be higher or lower than the levels of City funding set forth in Exhibit A. This Funding Agreement does not, itself, commit the City to the appropriation of any funding for streetcar. The nonbinding intent to appropriate described herein is to be implemented through City Council's budget appropriation process for fiscal years 2017 and 2018.



(ii) The City's commitment to Additional City Funding is capped at the lesser of the amount of Additional City Funding shown on the last line of Exhibit A for Revenue Service Years 1 and 2, respectively, or the difference between actual O&M Costs, actual Funding Sources, and the Guaranty Payment as calculated under Section 3 (for example, if revenue estimates exceed projections, less Additional City Funding than estimated may be required to pay O&M Costs); and

(iii) If, when the full amount of Additional City Funding found on the last line of Exhibit A is taken into account, the actual O&M Costs incurred or the actual revenues received from all Funding Sources in the course of operations result in a projected or actual deficit greater than that estimated in Exhibit A for a given Revenue Service Year, the City may impose streetcar budget cuts sufficient to balance streetcar budgets without impact to Haile's obligation under Section 3.

(b) If, subject to the foregoing qualifiers, the City does not provide Additional City Funding that is adequate to fund actual O&M Costs (as adequate is defined in Section 8(a), above), then Haile may, no later than 15 calendar days after receiving the Guaranty Payment Request, waive the application of this Funding Agreement for that Revenue Service Year by providing written notice of waiver to the City. In the event Haile invokes its waiver right pursuant to this Section 8, the terms of the Guaranty will apply, subject to the parties negotiating and agreeing on any necessary and appropriate credits and/or any necessary and appropriate pro-rating of, or adjustments to, relevant dollar amounts, including the \$900,000 cap per calendar year.

9. This Funding Agreement represents a negotiated compromise related to the obligations of Haile and other unknown third-party payors under the Guaranty. This Funding Agreement applies only to payments for O&M Costs during Revenue Service Years 1 and 2. The parties agree that this Funding Agreement shall not be used as evidence of the intended application or interpretation of the Guaranty and may diverge from the parties' respective interpretations regarding the intended operation of the Guaranty. This Funding Agreement does not apply to payments potentially owed under the Guaranty for O&M Costs occurring after the end of Revenue Service Year 2 unless the parties agree to apply it to such subsequent payments.

THE CAROL ANN AND RALPH V.  
HAILE, JR./U.S. BANK FOUNDATION

Timothy J. Maloney  
Timothy J. Maloney, President and CEO

Date: March 9, 2016

CITY OF CINCINNATI

Harry Black  
Harry Black, City Manager

Date: 3/9/16



**EXHIBIT A**

**STREETCAR BUDGET ESTIMATES**

March 1, 2016

<b>Streetcar Operating Costs (Section 1)</b>		<b>Rev. Year 1</b>	<b>Rev. Year 2</b>
Transdev Fixed Price Contract - §1(a)		\$3,269,922	\$3,308,165
SORTA Direct Costs - §1(b)		\$327,259	\$333,804
SORTA OH - §1(c)		\$261,594	\$264,653
City Overhead - §1(d)		\$359,318	\$366,504
<b>Total Projected Operating Costs</b>		<b>\$4,218,092</b>	<b>\$4,273,127</b>
<b>Funding Sources (Section 2)</b>			
Streetcar Fares - §2(a)(i)		\$676,969	\$683,738
Advertising & Sponsorships - §2(a)(ii)		\$139,650	\$139,650
Naming Rights - §2(a)(iii)		\$310,000	\$310,000
FTA Formula Funds - §2(b)		\$0	\$33,000
Tax Incentive Policy- §2(c)		\$10,947	\$187,850
City General Fund Commitment - §2(d)		\$1,500,000	\$1,500,000
<b>Subtotal</b>		<b>\$2,637,566</b>	<b>\$2,854,238</b>
<b>Annual Surplus/(Deficit)</b>		<b>(\$1,580,527)</b>	<b>(\$1,418,888)</b>
<b>Haile Foundation Guaranty Payment - §3</b>		<b>\$900,000</b>	<b>\$900,000</b>
<b>Additional City Funding - §8</b>		<b>\$680,527</b>	<b>\$518,888</b>
<b>Total</b>		<b>\$0</b>	<b>\$0</b>